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THE

CHARACTER AND CONDUCT OF THE WAR

BY

EVERETT P. WHEELER.

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THE WAR.

BY

EVERETT PEPPERELL WHEELER.

WARS ARE NOT MASSACRES AND CONFUSIONS BUT THE HIGHEST TRIALS OF RIGHT.
—*Bacon.*

VIRIBUS PARANTUR PROVINCIÆ, JURE REGANTUR.—*Florus.*

NEW YORK:
CHRISTOPHER, MORSE & SKIPPON

1863.

The following Address was delivered, in substance, before an Association of Young Men in this city, and is printed at the request of friends. A small portion of it has appeared in one of our journals.

THE CHARACTER AND CONDUCT OF THE WAR.

The men of this generation received from their fathers the heritage of American nationality. To preserve, to defend it, to transmit it to our children stronger than ever is the urgent, the essential duty of to-day; a duty beyond all secular duties in importance, in necessity. Our best blood flowed freely for it at Donelson, at Shiloh, at Antietam; and every man who treads the less dangerous paths of a civilian's life is bound in honor and in conscience to take heed that this blood shall not have been shed in vain.

"On all occasions," said the great philosophical thinker of the age, "the beginning should look towards the end, and most of all when we offer counsel concerning circumstances of great distress and still greater alarm." It is therefore with no apology that the true character and object of the war we have been, with varying success, engaged in for two years, should be discussed. Once settle these satisfactorily and we have settled how the war should be conducted, and can determine with some accuracy its probable result. The greatest defect in our Administration has been the lack of "some well-grounded purpose, some distinct impression of the probable results, some self-consistent anticipation." Truly does Bacon affirm that this is the prior half of the knowledge sought. This lack the country feels, and is seeking to supply, somewhat blindly, but earnestly withal. It is dissatisfied, it knows not precisely why, and every good citizen is bound to do what he can to bring order out of this sadly tumultuous chaos.

Let us enter upon this discussion with hearts inspired by the hallowed memories which encircle the cradle of our Republic, the union of hearts and hands which made and maintained us a nation—memories of Washington and Adams, Pinckney and Hamilton, of Jackson, of Clay, of Webster. To restore a na-

tion rent as is ours we need intelligence, need patriotism, need all the wisdom of the past, and all the experience of the present.

There are but two conceivable objects for which the war can be prosecuted, and the distinction between them is becoming broader and clearer every day. One party would make the war revolutionary, carried on to abolish slavery and overturn the social fabric of the South; the other would carry on the war to put down armed resistance to the government and restore the authority of the Constitution and the laws, and thus make it a war, not outside of the Constitution, nor unprovided for by it, but in pursuance of it—say, rather, in obedience to it. It will cease when this end is attained. This accomplished, all will be accomplished.

It is not proposed to examine the morality of slavery, or to enter upon any defence of that institution. However immoral any man may think that system to be, it does not follow that he ought to make war for its abolition. The paths of philanthropy and well-doing are many and diverse. To walk in them all is impossible, and the choice between them is therefore a question, not of strict moral right, but of expediency, of propriety, of how the most and most lasting good can be attained. Whether, therefore, this war should be carried on for the abolition of slavery must depend, not on the original or present character of that institution, but on the power vested by the Constitution in the general government, and in subordination to this, on the wisdom of immediate and violent emancipation.

The first party of which I have spoken is numerous, influential, thoroughly in earnest, and therefore powerful. It maintains that a restoration of the Union as it was is not desirable; that the Union our fathers made had this fatal defect—it did not provide for the extinction of African slavery—that slavery caused the war, and must continue to cause war till it is abolished and blotted out, and that a war for this is justifiable—is necessary. This object may have not been clearly seen at first. It certainly was not openly avowed; but now it is not disguised, and is advocated with all the eloquence and earnestness its partisans can command.

First, then, consider what their declarations mean : that the men who made the Constitution—that Washington, Franklin, Adams, Jay—were so weak, so short-sighted, so wicked as to charter and bulwark an institution destructive to the Union they sacrificed so much to establish.

Consider next, that if anything can be proved by the united testimony of all contemporary writers, by speeches, newspapers, debates, books, this is proved—that without the compromises of the Constitution on this subject there would have been no Union. Can we expect to maintain one on a different basis? "The Constitution itself," as Vermont resolved in 1843, "forms the only and proper bond of union among the several States." Destroy one and we destroy the other.

Consider that we do not think slavery in Cuba or Brazil any reason for a war to abolish it there. Yet, with these States we have no compact on the subject. How, then, can we justify such a war against the South, when there is a solemn, constitutional pledge against our interference with it there?

And is it not worth considering that those foreigners who did most to strengthen the anti-slavery spirit in our midst, do not sympathize with us in a war for emancipation? Go where you will in England, or on the Continent, the men who have written and spoken for emancipation all their lives, have spent and been spent for it, condemn sudden and violent emancipation as equally unjust to the master and the slave.* Say not that they are jealous of us ; their speeches, their books, their reports—reformatory, educational and legal, all commend this country, all urge their countrymen to follow our example. And the example of none has been so widely followed, in England especially.

War for emancipation has been defended by some as a benefit to Southern society. But the affection for the Southerners shown by these benevolent people does not entitle their view of the case to much consideration. They apply to politics Mrs.

* See for example Lord Brougham's letter to the Earl of Radnor. Law Magazine and Review, November, 1862; p. 69.

Malaprop's wise remark, that in marriage it is safest to begin with a little aversion. But hatred can never preside at truly philanthropic counsels, nor good be done to others out of pure revenge.

Or, if it be insisted that the war is to be waged for the benefit of the slave, may we not fairly appeal to experience? Does not this show, that to set millions unaccustomed to self-government suddenly at liberty, is a curse to them and to the people amid whom they live? And what right have we to shed the blood of thousands of our own people, or to tax our children and our children's children, that the wrongs of another race may be redressed? No law, human or divine, authorizes us to incite even an oppressed race to revolution. Admitting that we can lawfully help those already in arms, all our statesmen, our uniform practice, the opinion of the wisest men of foreign lands, agree that farther it is not safe, nor politic, nor just for a nation to go. It must be so, from the nature of things. Force may affect the outward actions, but cannot change the heart of man. Permanent reformation must come from inward change. There is no golden chain in the hands of the President, by moving which

"He shakes the earth, the sea, and solid land."

Abolish slavery to-morrow by external force, and the moment the force is removed the slave returns to his present condition. The master will be just as much inclined and just as able to rule, the slave just as much obliged to submit. Unless the Government is prepared to maintain a standing army indefinitely to keep these freedmen free—unless it will feed and clothe them till they are able to take care of themselves—unless it makes compensation to those owners, who are innocent, it cannot justify immediate emancipation. The arguments on this subject are too fully detailed in the President's Message of December last, to need any repetition here; and General Hunter's forced enlistment of negro soldiers clinches the argument with a stubborn fact.

Thus far I have met the radicals on their own ground, and

endeavored to show that even if slavery caused secession, a war for its abolition is neither just nor wise. But I go farther. Slavery may have been one of the causes of the rebellion ; the ill-feeling arising from opposition to it certainly occasioned the struggle, but that slavery was, in any just sense, the cause of the war, I deny.

From the adoption of the Constitution, there have been two parties in this country ; one favoring a strong, central government, and giving a liberal construction to the Constitution to attain that end ; the other strenuously advocating State Rights, construing very strictly the grants of power to the General Government, and maintaining that the Constitution is but a league between sovereign States. Webster and Jackson represent the one, Calhoun the other. They have had varying names, but no local habitation. Every subject on which there has been embittered strife has given rise to this controversy, and the defeated party has taken refuge in the States Rights doctrine, and threatened secession. The first great struggle grew out of the wars of the French Revolution, and ended with the treaty of Ghent. Personal and acrimonious beyond anything we have seen in the present day, it culminated in the Hartford Convention. The very party that had in times past most ardently advocated the power and unity of the Government, refused to let the militia serve out of their own State, stigmatized every man who lent a penny to the Federal Treasury, and met to take measures for a dissolution of the Union.

Again in 1830 people began to talk of disunion. South Carolina insisted that a protective tariff was a deliberate, palpable, and dangerous violation of the Constitution, armed her militia, and made ready for war. She was a sovereign State, it was said, and had an absolute right to judge when the league she had made with the other States was broken.

Texas was annexed, and resolutions looking ominously towards the dissolution of the Union were passed by more than one Northern Legislature. Five years later, Mississippi, South Carolina, Florida, took counsel to take away the same precious life. Then the tide of lawlessness flowed North again. Booth

was rescued from the United States Marshal in Wisconsin, the Federal troops were fired on in the streets of Boston, the men who now hold doctrines on the subject of Executive power which the Stuarts would have thought extreme, then advocated State Rights, while Mr. Jefferson Davis and his compeers were very indignant that any one should dare to construe the Constitution for himself, or dream of opposing the law of the land. Verily, the whirligig of time has brought about its revenges.

Is it strange that the cord of nationality subjected to this perpetual strain should have snapped at last? The heart sickens as we recall the want of foresight, the bitterness, the strife of the black years from 1854 to 1860. No man in office, no opposition leader looked into the future far enough to prepare for the storm which even then was darkening the sky, whose distant lightnings played along the horizon, whose muttering thunder even then was audible. We deserved no better. We have not yet learned Napoleon's maxim: "The tools to him that can use them;" office to him that is qualified to discharge its duties. Surely if any man ever deserved well of his countrymen that man was Daniel Webster. He devoted his life to the interests of the whole country; he was the soul of the opposition to Nullification in 1832, and in 1850 when the temporizers and expedient-mongers had failed, his large heart and comprehensive intellect effected a settlement which did justice to the South, while it preserved untouched the great principle of the supremacy of the Constitution and the laws. Amid abuse and reproaches he held his course unfaltering.

> "The startled waves swept over him, the storm
> Smote him with all the scourges of the rain,
> And steadily against his solid form
> Pressed the great shoulders of the hurricane;"

but he was unshaken. Under his leadership the country united and was at peace again. If gratitude or foresight had presided at our councils, we should not have rejected our greatest statesman and sent him to Marshfield to die. If we ever have another Webster it may be we shall do him justice.

Thus it has been shown that not slavery, but disregard of

law and lawful authority has been the common element in all our dissensions. Slavery had nothing to do with the tariff, nor with the war of 1812. It did not cause Shay's rebellion, or the whiskey insurrection, or the removal of the Cherokees from Georgia in violation of the judgment of the Supreme Court. There has been slavery in the Danish, Dutch, and Portuguese colonies, but it caused no irrepressible conflict between us and them.

If then our former dissensions were not caused by slavery, if in spite of that Pandora we have lived in amity with foreign powers, if the elements of dissension which caused other rebellions have been active in this, does it not logically follow that this was not caused by slavery, but by the same disregard of law and of lawful authority, which, as we have seen, in Massachusetts, in Pennsylvania, in Wisconsin, in South Carolina, in Georgia, in Mississippi, has in years gone by taken up arms against our country. And now that this evil spirit has assumed its deadliest form, it must be slain, once and forever. We began this war, avowing officially that its only objects were the enforcement of the laws and the restoration of the Union. Under this banner we can conquer, but no black flag will ever marshal our armies to victory. For these worthy ends the loyal people of the whole country have given our best and bravest, and we mean to attain them. We can and we will. We look forward to a restoration of the Union, whole as before. We would restore the authority of the Government, not the Government of the States, nor of part of the States, but of the whole Union, over all the South. We would make the South a vigorous member of the body politic, not a crippled and shattered limb. We would not devastate her fields, burn her cities, impoverish her population; for our own sake as well as for hers. We would conduct the war with all the vigor authorized by the laws of nations, with all the skill and earnestness commended by the example and precept of the great captains of the time of Napoleon, of Wellington, of Turenne, of Washington. And we would govern the South when conquered, and as it is conquered—not as England has

governed Ireland, or Austria Venice—but with justice and with moderation.

Then may we reasonably hope that the revolted States will return under the Constitution our fathers made ; a Constitution under which our growth in wealth, in population, in prosperity, in general culture, in morality and religion has been without a parallel. The rebels will have found secession too dangerous, too bloody, too destructive, to be again attempted. Upon this our hopes of a permanent reunion are founded, and reunion being feasible is essential. The people of this country will never tolerate a disgraceful peace, nor admit of any settlement founded on separation.

There remains now the further inquiry : What is the character of the present struggle? By what law is it to be regulated, on what principles conducted? The course of our government towards the seceding States was at first somewhat ambiguous. But now that the rebellion has attained to some consistency, and established a government *de facto*, we practically recognize them as belligerents. We exchange prisoners, even privateersmen, and in the laws of war, justification is sought for all assumptions of the executive. This view of the subject is unquestionably correct. The law of England is clear, as authorities are abundant to show. *

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* A reference to the authorities on this subject may not be uninteresting. In the first place, it is established that the settlers of this country brought with them such portions of the common law and the statutes in force in England as were applicable to their condition.

1 Story, Const. § 157. Declaration of Rights, Congress of 1774. Chalmers' Colonial Op. 206, 207. 1 Kent Comm. 472, 473.

This is especially true where English statutes have been re-enacted. In such cases the doctrine is that the well-settled English construction will be adopted here, and is presumed to have been the intent of the legislature.

2 Story, Const. § 1799. Waterford and Whitehall Turnpike Co. v. The People, 9 Barbour 161. Pennock v. Dialogue, 2 Peters (V. S.) 1, 18, Taylor v. Delancey, 2 Caines Cor. Err. 143, 151.

Both these remarks are applicable to the provision of the Constitution on the subject of treason. It adopts the words of the English statute of Edward. In the year 1494 (11 Hen. VII. Ch. I.) it was enacted that no person who followed the king in power to war, should be convicted of treason for that

The civilians are equally explicit on this subject. "A civil war," says Vattel,* "breaks the bands of society and government, or at least suspends their force and effect. It produces in the nation two independent parties, who consider each other as enemies and acknowledge no common judge. These two parties, therefore, must necessarily be considered as thenceforward constituting, at least for a time, two separate bodies, two distinct societies. Though one of the parties may have been to blame in breaking the unity of the State, and resisting the lawful authority, they are not the less divided in fact. Besides, who shall judge them? Who shall pronounce on which side the right or the wrong lies? On earth they have no common superior. They stand, therefore, in precisely the same predicament as two nations who engage in a contest, and being unable to come to an agreement, they have recourse to arms."

But why depend on these authorities, weighty as they are? The voice of history confirms them. No instance can be found of a rebellion similar in extent to that we are now dealing with, effectually quelled by treating the enemy as rebels. Did England ever have more than an uncertain grasp of the Highlands till she admitted the Highlanders to equal privileges with their lowland brethren? To the clemency with which the Scotch were treated, England owes the great increase in wealth, in arts, in learning, which her Scottish subjects have achieved for her and for themselves, while Ireland has never until very recently been anything but a source of weakness, a

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cause. Blackstone, Coke, and Hawkins lay it down that this act is declaration of the common law, for which Coke refers to 4 E. 4: 9 E. 4: 1, 2.

3 Inst. 7. 4 Bla. Comm. 77, 78. 1 Hawkins P. C. 87, 89. Blackstone's language is, (P. 78) "When, therefore, an usurper is in possession, the subject is excused and justified in obeying and giving him assistance."

See also 1 Hale P. C. 101. Foster, Crown Law 188.

The application is simple and just. The men who instigated the present wicked rebellion are guilty of treason; those who obeyed the Confederate government when established, are not. "Protection and allegiance are reciprocal."

*Book III Ch. 18, § 293. See also § 292, 294.

thorn in England's side. The prejudices of race, the hate springing from different institutions, were cherished in the one case, repressed on the other. In the former it was thought that even rebels might have some rights, that their property ought not to be indiscriminately confiscated, nor their cities pillaged. But the idea that an Irish rebel had any rights seldom seems to have entered an English statesman's head until the present century.

Was ever a rebellion more unprovoked? Were ever rebels more cruel than the Leaguers against Henry Fourth? Was ever cause more beloved by its supporters? Let St. Bartholomew answer the former question. As to to the latter, the Parisians paid almost divine honors to the Duke of Guise, and cried "Hosanna to the Son of David!" as he rode into their town. Never was rebellion more effectually put down. How? By vigorous campaigns; not by proclamations: by energy and perseverance, it is true; but by moderation united with them. "We must not make a graveyard of Paris," said the victor of Ivry. "I would not reign over the dead. Like the true mother before Solomon, I would rather not have Paris than see it torn to fragments." Thus, "those who would have continued his enemies, if only subdued by arms, were won by his goodness, and became affectionate subjects."

Even if it were possible to conquer the Southern people by the bloody and inhuman measures many are panting for, would we wish to rule a subjugated South, as Italy, Poland, or Hungary have been governed by their masters?

"What do men call vigor?" says Sydney Smith, (and the words are at least applicable to our management of the conquests already made.) "To let loose hussars and to bring up artillery, to govern with lighted matches, and to cut and push and prime? I call this not vigor, but the sloth of cruelty and ignorance. The vigor I love consists in finding out wherein subjects are aggrieved, in relieving them, in studying the temper and genius of a people, in consulting their prejudices, in selecting proper persons to lead and manage them, in the laborious, watchful, and difficult task of increasing public hap-

piness by allaying each individual discontent. In this way Hoche pacified La Vendee, and in this way only will Ireland ever be subdued." *

To many these sentiments will seem surprising. Napier's description of the British soldiery at the siege of Badajos is applicable to ourselves. "Recent toil and hardship," he says, "with much shedding of blood, had made many incredibly savage, for these things render the noble-minded, indeed, averse to cruelty, but harden the vulgar spirit." We must look beyond the immediate present, must sacrifice passion and prejudice, and even revenge, to our country's welfare, and build not for a day but for all time. Thus the war will be conducted according to law and justice, chiefly and first, because it is right, and then because all experience shows that the path of right is the only one that leads to victory. The history of other countries is full of encouragement for us; it teaches that nations more bitterly hostile than North and South are, have been firmly re-united; it teaches how this has been done, and in its school we should be content to learn.

Enough has been said as to the general theory of the war.

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* The wit of another quotation from the same author will make amends for its length, and may possibly convince some of our radical friends that all the wisdom and good sense in the world will not die with them. It was written about the time of the wars with Napoleon, and aptly describes our ingenious attempt to reduce the South by depriving them of quinine.

"Such a project is well worthy the statesman who would bring the French to reason by keeping them without rhubarb, and exhibit to the world the awful spectacle of a nation deprived of neutral salts. What a sublime thought that no purge can now be taken between the Weser and the Garonne! that the bustling pestle is still, the canorous mortar mute, and the bowels of mankind locked up for fourteen degrees of lattitude! When, I should be curious to know, were all the powers of crudity and flatulence fully explained to his majesty's ministers. In whose mind was the idea of destroying the pride and plasters of France first engendered? Without castor oil they might for some months, to be sure, have carried on a lingering war, but can they do without bark? Will the people live under a government where antimonial powders cannot be procured? Depend upon it, the absence of materia medica will soon bring them to their senses, and the cry of Bourbon and bolus burst forth from the Baltic to the Mediterranean."

A discussion of the extent of executive power in its prosecution will close this essay. And, first, of the Proclamation of Emancipation.

Judge Curtis' pamphlet on this subject ought to have set the matter at rest, but the numerous attempts to answer it show that cogent and impartial logic does not always convince. One gentleman modestly remarks that he would not have thought it worth his while to attempt a reply had not Mr. Curtis been an eminent man. Another spends his time in proving a proposition which is not denied—that the President, as Commander-in-Chief, has the powers vested by the law of nations in such commanders, and assumes, without argument, that a General in an enemy's country has a right to confiscate property and emancipate slaves not in his possession, which is the very point in dispute.

Judge Curtis expressly says: The President, "in prosecuting war, may do what Generals in the field are allowed to do within the sphere of their actual operations, in subordination to the laws of their country, from which alone they derive their authority."

But what is the law of nations on this subject, and how far does it justify the proclamation of the first of January?

It must be remembered that the Constitution does not profess to be a code of laws; it establishes general rules and uses general language, the explanation of which is left to the well-recognized law then in existence. In saying, for example, that the President may be impeached "for high crimes and misdemeanors," it employs terms the meaning of which was well understood. Nor does it leave to Congressional discretion to prescribe what shall be high crimes and misdemeanors. The guaranty of trial by jury is of a trial known to and regulated by the common law*. And when it speaks of habeas corpus, of warrants of arrest, and indeed of all subjects, treason forming only a partial exception, reference is had to rights brought by the colonists from England, and for which they had just fought

*See Anthes v. the Commonwealth, 5 Gray (Mass.) Rep. 185, 186, 222, 251 for a full discussion of this subject. Wynehamer v. the People, 13 N. Y. Rep., (3 Kernan,) 378, 427, 458, 484, 487.

a seven years' war, and the nature and extent of which needed no exposition. A similar rule must be applied to the section making the President Commander-in-Chief, and it is therefore that reference to the law of nations must be had to ascertain the limits of his Constitutional power in that capacity; and that law is as much a part of the Constitution on this subject as if it were expressly embodied in it.

The frequent declamation on the wrongs on the African race are little to the purpose. No doubt, they have been wronged; but in redressing or attempting to redress their injuries, we must not do a greater to them and to ourselves. We must not do evil that good may come, nor overlook what is within our grasp in a vain reaching after the impracticable. If we do right, act up to the limits of constitutional and legal obligation, and no farther, we may expect a blessing on our deeds and assured ultimate success, and not otherwise, though a contrary course look ever so temptingly expedient. The law of nations, which is nothing else than the collected wisdom and experience of mankind, has established rules, by obeying which wars can be most successfully and most humanely conducted. We shall find them rigid enough for our purpose. Minie balls, case and spherical shot, grape and canister, do not savor of rosewater. They are bad enough even for the rebels. Indeed, we have relaxed the laws of war towards the enemy's soldiers; have paroled spies, and liberated guerillas, while resorting to questionable and cruel expedients for injuring the Southern people, and attempting to do by paper bullets what we had failed to accomplish by open and manly warfare.

Now, the right of the master to the services of his slave is property actually existing, recognized by the local law of the South, and in the most explicit terms by the President's December Message. The Proclamation therefore declares that a General has the right to confiscate the private property of the enemy, not needed for military purposes, and not in the possession of his troops. That negroes who escape to our camps ought to be employed in military works; that there is no legal obligation to return them to their disloyal master, is freely ad-

mitted. But the Proclamation goes farther, and attempts to affect the title and condition of property beyond our lines and not in our possession. The writers on international law agree that this no commander or government has a right to do. Hume's theory that it is lawful to do anything which will subdue the enemy, was exploded long ago. Indeed, the right to confiscate private property on land is a relic of barbarism, less frequently claimed every year. Wheaton goes so far as to say that "private property on land is exempt from confiscation, except booty taken from enemies in the field, or in besieged towns, and military contributions, even in case of conquest." He indorses the declaration of Monroe, that the seizures of public and private property by the British, during the last war, were "cruel, wanton and unjustifiable."*

It must be admitted that on this point Wheaton is not supported by authority ; but Grotius, Vattel and Phillimore agree "that unless the conqueror has actual possession of the thing conquered, he can exercise no rights over it."† It was reserved for the self-chosen advocates of freedom in free America, in the nineteenth century, to maintain the doctrine that the conqueror is absolute master of the conquered country, and can confiscate all the property of its people, a claim which Vattel justly calls monstrous, which Tilly would have thought severe, and at which Alva would have hesitated.

The Administrative claims on the subject of habeas corpus and the law martial, are the only other topics connected with the conduct of the war that I propose here to discuss. A great deal has been said and written on the writ of habeas corpus, which is really a very simple matter. A law of Congress provides that whenever any one is imprisoned by the authority of the United States a federal judge may, on the proper application being made, require the reason for his imprisonment to be stated, and

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* International Law, 420, 423. Part IV., ch. 2, § 5, 6. What will history say of our plundering Southern libraries, and sending North the statue of Washington at Baton Rouge?

† Vattel. Book III., ch. 14, § 200, 208. 3 Phill., Int. Law, 504, 682, 694, 735. Book XII., ch. 3, § 541.

discharge him if the reason is insufficient. And the question is whether, in opposition to this law, the President has a right to imprison citizens without their having any means of knowing why they are imprisoned, or any redress if the reason is insufficient.

It would seem that in a free country this ought not to be a subject for discussion. Before the war, all the writers on the Constitution, and all the judges who had ever given opinions on the subject, agreed in saying that the President had no such power, and the preponderance of decisions since the war, in number and authority, is the same way. These furnish a very strong presumption on the subject, but perhaps are not quite conclusive. Consider for a moment the arguments on the other side.

Horace Binney takes this ground: The right to the writ of *habeas corpus* is in England guaranteed by an act of Parliament. But in this country the Constitution does not confer the privilege; it only restrains its suspension. It does not say who shall suspend it, and the only question, therefore, is: To whom does this power most properly belong? And he concludes that it belongs to the President.

Even if the premises were true the conclusion would not follow. The restriction is in the article referring to Congress, not that which treats of the executive. It is preceded and followed by prohibitions on congressional action, and unless, by some unaccountable mistake, it was inserted in the wrong place, it must also have been intended to limit the power of Congress. The *Federalist*, the contemporary debates, all treat it as a power vested exclusively in Congress, and the objection taken at the time was, not that this great power was conferred on the President—that was never imagined—but that too large a discretion was left *to Congress*. In a separate article, the powers of the executive are enumerated; this is not among them. Such a power had never been claimed in this country, and had been given up in England for over a century. Any one who supposes that the framers of our Constitution intended to make the President more powerful than the King of Great Britain, is respectfully recommended to study the debates in the conventions which adopted it, or the sixty-ninth number of the *Federalist*.

The radical vice of Mr. Binney's argument is in the assumption that in this country the privilege of this writ, which Blackstone calls "the bulwark of the British constitution," is conferred by the common law alone. It is guaranteed by an act of Congress—an act the President swore to support, and which has never been repealed. Congress says: This prisoner shall be heard. What right has the President to say: He shall not?

Another argument on the snbject is based on the supposed necessity of such a power. A very able writer in the *North American* draws a glowing picture of the consequences which would result from carrying into effect Chief Justice Taney's opinion in the Merryman case, and fills the Maryland jails with soldiers arrested for trespassing on the soil of that State. The answer to all this is, that the privilege of knowing the cause of one's imprisonment is a very different thing from a discharge. There are such things as martial law and a justification under it, and if Gen. Cadwalader had returned to the Chief Justice that Merryman was a prisoner of war, taken in hostilities against the United States, and was held under the law martial, he would have been remanded, and there the matter would have ended. It is with pride and pleasure that every true American contrasts with this the respectful obedience to judicial authority which marked the last days of Gen. Banks's visit to this city.

This mention of the law martial brings us to a still more novel pretension of the President—the alleged power of proclaiming martial law whenever and wherever he shall think it necessary to put down a rebellion. Martial law is the will of the commanding officer, and if this be a rightful claim, the life, liberty, and property of every citizen are at the mercy of the President and his subordinates, and he becomes dictator at his own will--not at the will of the Senate, as ih Rome, or of Congress as in the Revolution.

The logic of the advocates of this more than despotic power is most amusing. The President is commander-in-chief of the army, *therefore* he can arrest and imprison John Smith, who never was a soldier, nor even an army contractor; *therefore* he can send his provost marshal or his military governor to a

place far distant from the scene of military operations and seize some unlucky editor who cannot comprehend Mr. Lincoln's strategetic movements or Mr. Chase's financial schemes. It is as if they said: Seymour is Governor of New York, *therefore* he can order out the New Jersey militia. Victoria is Queen of Great Britain, *therefore* she can direct Hooker to take Richmond. For civil and military powers and laws are as distinct as these separate States or nations.

The law on this subject has been stated with precision by a man respected by every lawyer who knows anything of the leaders in his profession—a man who had no superior when on the bench, and who now is, in learning, clearness, and impartiality, unsurpassed at the bar of New England. His dissenting opinion in the Dred Scott case shows that he has no partisan bias toward his conclusion on this subject, which is best stated in his own language:

"Over all persons enlisted in his forces, he" (the President) "has military power and command; * * over all persons and property within the sphere of his actual operations in the field he may lawfully exercise such restraint as the successful prosecution of his particular military enterprise may, in his honest judgment, actually require: and upon such persons as may have committed offences against any articles of war, he may, through appropriate military tribunals, inflict the punishment prescribed. *And there his lawful authority ends.*"*

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*The pamphlets of Judge Parker on this subject are equally explicit. In addition to these eminent jurists, reference may be had to the Federalist, number 69, p. 317 (Hallowell, Ed.). His authority as commander in chief "would amount to nothing more than a supreme command and direction of the military and naval forces as first general and admiral of the Confederacy." See, also, number 84, p. 392. In the Massachusetts convention which ratified the Constitution, Judge Dana said of the power of suspending the writ of habeas corpus: "The safest and best restriction, therefore, arises from the nature of the cases in which *Congress* is authorized to exercise that power at all." Judge Summer said "that this was a restriction on Congress, that the writ of habeas corpus should not be suspended except in cases of rebellion and invasion." 1 Elliott's Debates, 118. These references might easily be multiplied. The debates and pamphlets of that day are full of them.

But, after all, the most cogent answer to the arguments for Executive discretion, drawn as they invariably are from the supposed necessity of the case, is, that no such necessity ever existed. The experiment has been tried, and has failed, totally, disgracefully. The Executive undertook to make its own discretion the measure of its power, and what has been the result? The friends of the Administration have been cooled, its enemies heated. In April, 1861, it had an overwhelming majority in every Northern State. It could not receive as fast as we were willing to give. Men and money were lavished with unsparing hand, rights the most time-honored were yielded without a murmur, volunteer regiments were refused (think of that in these days of Conscription acts), party divisions were forgotten; the great meeting at Union square, in this city, was but the echo of the voice that rose from every city and every hamlet in the land. What do we now see? An opposition Congress elected, a dissatisfied and unpaid army, a discouraged and disheartened people. Was it necessary to fill the cells at Fort Lafayette and Fort Warren, necessary to exclude newspapers from the mails, necessary to cover the North with spies and provost marshals, that these results should be effected? Compare the letters our soldiers wrote a year ago with those they write to-day. Compare the appearance of our streets, the state of our finances, the rate of exchange. Compare Donelson with Fredericksburgh, New Orleans with Vicksburgh, Island No. 10 with Charleston, the glorious march into Mississippi with the barren victory of Murfreesboro'.

People will think, will compare, will remember. It is useless to disguise the fact that the great body of Northern men have lost all confidence in the Administration. It may be that the voice of the people will yet recall them to the principles under whose guidance we have won all our victories. A clear, manly and unwavering call may yet rally us all; but if it does not come, what are we to do?

In England this question would not wait a moment for an answer. The king is the impersonation of Executive author-

ity, is respected and influential as such. Theoretically, he can do no wrong, and it is he who does all. But practically, there is a responsibility in his ministers. He appoints them, but their service is only during good behavior. The remedy for official misconduct is a change in the cabinet. When, in the Crimean war, they reached the point to which we have now come, when the army was plundered by contractors, and the navy disgraced by leaky hulks,* the Duke of Newcastle and Lord Derby went out, and Lord Palmerston and Sir John Russell came in. The result was victory.

It was not always so in England. The king once was practically the Executive officer of the realm. He was what our President now is, in fact—Commander-in-Chief. He was likewise legally irresponsible, as our Executive practically is during his term of office. Revolution followed revolution, Parliament was just as obstinate, and paid as little attention to the Royal will as Congress does to the Presidential. Unable to direct executive action, it could prevent, and it did. A change was necessary, and it came. The theory was unchanged: the king still approved of laws, prorogued and dissolved Parliaments, made war and peace, commanded the army and navy. But, practically, the cabinet did all this; they were re-

* The treatment of our army is the worst feature in the conduct of the war. That the brave men who left home and all that is dear to them to fight for our nation's honor and security should have been left unpaid for months, some regiments for a year, is inexcusable, but it is not the worst. The men have not been half fed. The rations promised were ample, but not a quarter have been furnished. The horses have been treated as badly. Cavalry regiments have been dismounted because the horses were literally starved to death from the neglect of the transportation department and the rascality of contractors. It is easy to say they should live on the country they are in, but any one who has recently visited those portions of Virginia traversed by the contending armies, knows the impossibility of foraging there.

And sleek editors, who sit quietly in their easy chairs, dare to stigmatize as traitors those who are not afraid to expose these abuses and endeavor to rectify them and do justice to the brave fellows who at Falmouth, at Stafford Court House, and in the West, have faced the pitiless storms of this inclement winter. "Time, the avenger," will judge between us and them.

sponsible to Parliament, and Parliament was responsible to the people.

Have we not reached a point when a similar change is necessary to us? I do not say Yes, or No. The question is vast, the answer difficult. Some of the advantages of a change are obvious. The forms of the Constitution need not be altered, nor would its spirit be violated. It places a vast power in the hands of the Executive. It intended that he should be responsible. He has ceased to be, partly from the extent of his patronage, partly from the growth of the country in territory and wealth, which is, indeed, the cause of the former. It intended that Congress should be the grand council of the nation. It has ceased to be. It was found in the beginning that one man could not discharge the duties imposed by the Constitution on the Executive, and provision was made for a cabinet, a body of which no mention is to be found in the Constitution, and which is the creature of statute. The change suggested certainly would not make the Electoral College a more idle ceremony than it has already become. It would, by means not forbidden by the Constitution, effect results contemplated by it, and which existing machinery has failed to accomplish. It would furnish in the Presidency a dignified retreat for the old age of our most eminent men; and, by giving Congress power and influence, would place our ablest men there, where we need them. It would give the Executive efficiency, by assuring it of Congressional support; and we should not witness again the humiliating spectacle of a Presidential Message, the whole of which was devoted to one subject, excluding even a just tribute to the bravery of our soldiers, falling dead on the Legislative threshold, not finding a single member to introduce a bill to carry into effect its proposals. We should not see the President informing the Houses that he had signed a Revenue bill because it was necessary to carry on the Government, but that he disapproved of its whole scope and theory. Certainly, these instances—and they could easily be multiplied—of Congressional disregard of Executive recom-

mendations, should protect the advocate of a responsible government from the charge of factious opposition.

But whether this plan or another be adopted, it is clear there must be a change in the conduct of the war. Our cause is too sacred and too just to be sacrificed to personal friendship or the pride of opinion. We have already unlearned some foolish fallacies; it is time for us to unlearn them all, and to profit by our own bitter experience, if by nothing else. We started with the idea that the conquest of the South was the work of a few months. We were sadly mistaken. We have learned on many a hard-fought field that Southern troops are not the "white trash" many took them for—that in generalship, in valor, in resolution and pertinacity, in patient endurance, they are our equals. They are men we may yet be proud to call our brethren. Their country is one with ours in original formation and in interest, and we must, we shall yet be united.

The cry of disloyalty with which sentiments such as these once was greeted has lost its sting. There is no terror in it. New York answered the threat with the change of one hundred and ten thousand votes in a twelvemonth, and the whole North has done, or is doing, the like.

Relieved from these hateful influences which have hung upon us like a nightmare, we shall go forward to victory. The clouds and darkness which surround us now will flee away; the sky will shine clear and abiding above our heads; we will build on the foundation of the Constitution a fabric of national virtue and greatness such as has never yet been seen, and our posterity—the posterity of a united people—will read of the great rebellion of 1861 as we do of the wars between the Cavaliers and the Roundheads. If virtue, if justice, if obedience to law—if firmness and experience preside at our councils, we may, we shall, by the blessing of God, accomplish all these, and if they do not we shall deserve to perish.

As these sheets go to the press, a very remarkable letter from an eminent lawyer of this city appears in one of our journals. The chief objection to it is that in its application to the past it lacks some slight foundation in fact, but if in the future it be our government's rule of action, all will be well. Mr. Field asks: "What would you conserve? The liberties of the people? so would we. The Union of the States? so would we. The Constitution as it is? so would we." He says: "We do not wage this war to destroy slavery, but to restore the Union." It is with great pleasure that this accession to the Union ranks is hailed, and if the recent elections produce a few more such they will not have been fruitless. How these views will be received by Mr. Field's party friends remains to be seen.

The charge that the opposition as a body propose to themselves any other objects is most flagrantly unjust. The administrative assaults on our liberties and constitutional rights gave the opposition all its strength. I cannot forbear a quotation from an oration on Washington's birthday, delivered in 1851, by a gentleman who has been most unjustly and indecently assailed because he desires now to have such views disseminated. "The majority," Mr. Wheeler then said and now says, "must govern according to the written code, or we become traitors to our country, violators of an imposed or consented obligation. Our will, if arrayed against law, is in truth the assertion of the traitor, and if it becomes active the possessor deserves a traitor's fate. * * Our pledge is given that no star shall be plucked from its fellows, that no stripe shall be torn from the flag of the Union, and that the eagle shall perch upon our Capitol, and be borne to every nation upon the top-gallant mast of America's proud navy."

Be it remembered that these words were spoken when the editors of the *Post* and *Tribune* sneered at every expression of loyalty, and tried to ridicule loyal men as "Union-savers;" a title to which, it is true, those gentlemen never could lay claim. The zeal of these new converts to patriotism has, as is often the case, outrun their discretion; and when the language of loyalty has become a little more familiar to their lips, it may be that they will show a decent gratitude to their old instructors.

Indeed, if they had taken the trouble to remember Gov. Seymour's message, they ought to have known that their charges of disloyalty, so freely made, were false. Can anything be more explicit than this? "Our armies in the field must be supported, all constitutional demands of our general government must be promptly responded to. *Under no circumstances* can the division of the Union be conceded."

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